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JOHN T. FEY,

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 349

EUGENE E. HANF

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI

J. M. GEORGE
163-165 Center Street
Winona, Minnesota
Attorney for Petitioner

Of Counsel:
C. STANLEY MCMAHON
OF
GEORGE, BREHMER & MCMAHON
163-165 Center Street
Winona, Minnesota

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EUGENE E. HANF

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PETITION FOR WRIT OF CERTIORARI

Comes now petitioner and respectfully represents and shows to the Court in his petition for a writ of certiorari:

1. OPINIONS IN THE COURTS BELOW

After conviction, the trial court, in United States District Court for the District of Minnesota, made its order August 16, 1955, denying defendant's motion to dismiss counts I and III of the Indictment. The order and accompanying memorandum is not reported but is set forth verbatim in Appendix A of this petition. The opinion of the United States Court of Appeals for the Eighth Circuit affirming the District Court, which opinion was rendered July 25, 1956, is not yet officially reported but is set forth verbatim in Appendix B of this petition.

2. GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(a) Petitioner seeks to review the judgment of the United States Court of Appeals entered July 25, 1956. This judgment is printed in Appendix C of this petition.

(b) There has been no rehearing or order granting an extension of time within which to petition for certiorari.

(c) A statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. Section 1254(1).

3. QUESTIONS PRESENTED FOR REVIEW

(a) Does the first count of the Indictment which does *not* charge that defendant was a rectifier or wholesale liquor dealer or that he sold or offered for sale distilled spirits in quantities of five wine-gallons or more to the same person at the same time charge an offense against the United States under 26 U. S. C. Section 2857 which requires that every rectifier and wholesale liquor dealer who sells or offers for sale distilled spirits in quantities of five wine-gallons or more to the same person at the same time keep certain records and make certain reports referred to in the Indictment?

(b) Is count I of the Indictment duplicitous in that it charges more than one offense in one count where it charges that between October 16, 1953, and July 1, 1954, defendant failed to keep and made false wholesale liquor dealer's *monthly* reports?

(c) Is that part of the Federal Alcohol Administration Act 27 U. S. C. A. Section 203(c)(1) unconstitutional as requiring a permit to engage in the *intra*state business of purchasing distilled spirits for resale at wholesale?

4. CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions which the case involves are Amendment V to the Constitution of the United States which provides "no person shall be * * * deprived of life, liberty, or property without due process of law * * *."

Amendment VI which provides "in all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation * * *."

Rule 7c of the *Federal Rules of Criminal Procedure* which provides "the Indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offenses charged. * * *."

26 U. S. C. Sec. 2857, which provides in part:

> "Books of rectifiers and wholesale dealers
> "(a) Requirements. Every rectifier and every wholesale liquor dealer who sells, or offers for sale, distilled spirits in quantities of five wine-gallons or more to the same person at the same time shall keep, daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records."
> (See Appendix D for full text.)

27 U. S. C. A. 203(c)(1).

> "It shall be unlawful, except pursuant to a basic permit issued under this chapter by the Secretary of the Treasury—(1) to engage in the business of purchasing for resale at wholesale distilled spirits, wine, or malt beverages; * * *."

Section 8 of the United States Constitution provides: "the Congress shall have power: * * * to regulate commerce with foreign nations and among the several states * * *," and

Amendment XXI to the United States Constitution which provides: "Section 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

5. STATEMENT OF THE CASE

Defendant was indicted by the Grand Jury at St. Paul, Minnesota, on September 9, 1954. Venue was laid in the First Division of the District of Minnesota at Winona, Minnesota, as the defendant who resides at Austin resides in that Division of the District. On September 27, 1954, defendant voluntarily appeared with his then counsel at St. Paul, Minnesota, which is in the Third Division, posted his bond and entered pleas of not guilty to each count. The case was called for trial May 23, 1955, at Winona, Minnesota, and before trial the Government dismissed count II of the Indictment. Also before trial defendant moved to dismiss both counts I and III of the Indictment on the grounds that they did not state an offense against the United States and to dismiss count I on the additional ground that it was duplicitous. The court denied the motions and the case proceeded to trial.

Count I of the Indictment reads as follows:

> "Between October 16, 1953, and July 1, 1954, inclusive, in the City of Austin, County of Mower, State and District of Minnesota, Eugene E. Hanf, did then and there wilfully, wrongfully, unlawfully and intentionally fail to make entries in and properly keep Record 52B 'Wholesale Liquor Dealer's Monthly Report', and Form 338, 'Wholesale Liquor Dealer's Monthly Report (Summary of Forms 52A and 52B)', and knowingly and intentionally and wilfully submitted and filed said forms and documents, containing false statements and false entries, with the United States Treasury Department, Internal Revenue Service."

Count III of the Indictment reads as follows:

"(27 U. S. C., Sec. 203(c)(1))

"Between October 16, 1953, and July 1, 1954, inclusive, in the City of Austin, County of Mower, State and District of Minnesota, Eugene E. Hanf, did wilfully, wrongfully, unlawfully and intentionally engage in the business of purchasing distilled spirits for resale at wholesale, without first having procured a wholesaler's basic permit."

The Government introduced proof that for several years defendant operated a retail liquor store at Austin, Minnesota, and that for each year since 1950 he had purchased a retail liquor dealer's stamp and a wholesale liquor dealer's stamp.

The Government called the Supervisor of Audit in the Permissive Division in Omaha of the Alcohol and Tobacco Tax Division which supervises the Federal Alcohol Administration Act. He testified that basic permits are obtained upon application and after investigation without cost and they continue until surrendered or revoked. A wholesale dealer's stamp is a tax for the privilege of doing business and under it he can sell more than five wine-gallons of distilled spirits to the same person at the same time.

He testified a wholesale liquor dealer is required to keep a record on Form 52A which shows where he purchased the liquor he sold at wholesale, a record on Form 52B to show to whom the liquor was delivered not necessarily to whom sold; also he is required to file monthly a summary of Forms 52A and 52B on a Form 338 but if he has no wholesale transactions during the month, he just files a Form 338. These reports have nothing to do with basic permits.

The Government introduced in evidence the Forms 338 filed by the defendant for the months of October and De-

cember, 1953, January, February, March and April, 1954, which showed no wholesale transactions for those months. The Government also introduced in evidence the Forms 338 filed by the defendant for the period of November, 1951 to September, 1953, all of which with one exception showed no transactions.

The Government introduced proof that in 1953 and 1954 he had purchased distilled spirits from liquor distributors in St. Paul and Minneapolis, namely, Griggs Cooper and Company, Ed Phillips & Sons Company, and Ebin Brothers.

The Government's evidence showed that Albert Lea, Minnesota, is located in Freeborn County and that before the election on May 24, 1954, it was a dry county. According to records kept by employees of the Veterans of Foreign Wars Club and the Elks Club at Albert Lea, those clubs had made purchases from liquor stores located in wet counties in Minnesota, including defendant's store at Austin and that some of these purchases showed more than two cases purchased on the same date.

There was no evidence that defendant either bought or sold distilled spirits outside the State of Minnesota.

At the close of the evidence defendant renewed the motion for dismissal and moved for judgment of acquittal which motions were denied.

On May 24, 1954, the jury retured a verdict of guilty on both counts. Defendant promptly renewed the motions to dismiss and for judgment of acquittal. Briefs were filed and the court denied the motions by written memorandum filed August 16, 1955.

On August 29, 1955, defendant voluntarily appeared at Minneapolis, Minnesota (Fourth Division), for sentence and the court sentenced the defendant to pay a fine of

Fifteen Hundred ($1,500.00) Dollars and to be confined in a County Jail for a period of three (3) months on the first count and to pay a fine of One Thousand ($1,000.00) Dollars on the third count.

On August 30, 1955, defendant served his notice of appeal to the Eighth Circuit Court of Appeals. The case was argued May 7, 1956, and decided July 25, 1956, in a written opinion by Circuit Judge Vogel. Judgment was entered July 25, 1956, which judgment is sought here to be reviewed.

6. ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(a) The first count of the indictment.

In deciding that the first count of the Indictment stated an offense against the United States the Court of Appeals for the Eighth Circuit has so far departed from the applicable decisions of this Court so as to call for the exercise of this Court's supervision.

One of the most important constitutional guarantees in criminal law is that the written accusation called the Indictment must charge an offense. In the absence of such an Indictment there is no offense. It has been repeatedly held by this Court that no material fact embraced in the statutory definition of the offense can be omitted from the Indictment. *United States v. Hess,* 124 U. S. 483; *United States v. Cook,* 17 Wall. 168; *Cochran & Sayre v. United States,* 157 U. S. 286. The *Federal Rules of Criminal Procedure* have not changed the rule that essential facts must be pleaded. *United States v. McCullough,* 6 F. R. D. 559.

Count I of this Indictment omits the most essential fact necessary to charge an offense under 26 U. S. C. 2857. It does not charge that he is either a rectifier or a wholesale

liquor dealer or that he sold more than five wine-gallons of distilled spirits to the same person at the same time. If defendant is not a wholesale liquor dealer he is not required to make the reports referred to in the Indictment. Even if he is such a dealer and does not make the sales referred to in the Statute he is not required to make these reports. If he is not required by law to make reports the making of a false report or the failing to make a report at all cannot be a violation of the law. For instance, it could be successfully charged and proved that the writer of this brief has failed to make reports on Form 338 referred to in the Indictment. But, as we are not wholesale liquor dealers or rectifiers we are not required to make such reports and therefore have not violated any law. Although this question was thoroughly briefed and argued the Court of Appeals passes over the question with the remark that if defendant desired further information he could have demanded a bill of particulars. This misses the point entirely. Of course, a good Indictment must sufficiently inform the defendant so that he can prepare his defense and be able to plead double jeopardy for a similar offense but it must *also* contain every element of the offense intended to be charged. *Cochran & Sayre v. United States, supra; Horn v. United States,* 182 F. 721; *Jarl v. United States,* 19 F. 2d 891.

Until the decision in this case the Eighth Circuit has always followed this rule. For instance, in *Harris v. United States,* 104 F. 2d 41 an indictment charging a Federal employee with making false records was held defective where it did not allege the defendant was required to keep such records. Also, *Shaw v. United States,* 292 F. 339 an indictment charging a bank officer with embezzlement was held not to state an offense under the Federal Reserve Bank Act because it did not allege that the bank was a Federal

Reserve Bank. See also, *Johnson v. United States,* 294 F. 753; *Pendleton v. United States,* 290 F. 338; *Cooper v. United States,* 299 F. 483.

The opinion in this case of the Court of Appeals if permitted to stand would sanction the practice of indicting defendants without stating in the Indictment the essential facts of the offense.

Count I of the Indictment is also duplicitous. It covers a period of some eight and one-half months and refers to monthly reports. At least eight such reports would be covered in this period. Separate proof would be required to prove that each report was made and that it was false. That is the test of duplicity. *United States v. Martinez-Gonzales,* 89 F. Supp. 62; *United States v. Dembowski,* 252 F. 894; *United States v. Clark,* 125 F. 92; *United States v. Morrison,* 16 F. 2d 934.

(b) The third count of the indictment.

The question involved on the third count of this Indictment presents the novel and important question of Federal Law as to whether or not the Federal Alcohol Administration Act is a constitutional exercise of congressional power when it attempts to require a permit for the engaging in solely intrastate business of purchasing distilled spirits for resale at wholesale.

This question has not heretofore been decided although in *Arrow Distilleries v. Alexander,* 109 F. 2d 397, cert. den. 310 U. S. 646, the permit provisions of this Act were sustained where the petitioner was engaged in interstate commerce and in *Jameson & Co. v. Morgenthau,* 307 U. S. 171 the constitutionality of the Federal Alcohol Administration Act was involved but the case involved an importer in foreign commerce. The defendant in this case is engaged solely in intrastate commerce.

It is our position that the Twenty-first Amendment to the Constitution restored to the states the broad regulatory power over the liquor traffic within their boundaries with the recognized exception of the power of the Federal Government by virtue of the commerce clause. *Carter v. Virginia*, 321 U. S. 131; *United States v. Frankfort Distilleries*, 324 U. S. 293.

The provisions of 27 U. S. C. Sec. 203(c)(1), as interpreted by the United States Court of Appeals of the Eighth Circuit in this case, is an unconstitutional exercise of congressional power. *Schechter Corporation v. United States*, 295 U. S. 495. In the alternative, we suggest that the Court of Appeals should have constituted this statute so as to save its constitutionality by limiting it to business engaged in interstate or foreign commerce. With that construction and limitation, the third count of the Indictment should have been dismissed by the failure to allege and the additional failure to prove that this defendant was engaged in interstate or foreign commerce.

For the reasons stated it is respectfully submitted that the writ of certiorari should issue.

J. M. GEORGE
163-165 Center Street
Winona, Minnesota
Attorney for Petitioner

Of Counsel:
C. STANLEY MCMAHON
OF
GEORGE, BREHMER & MCMAHON
163-165 Center Street
Winona, Minnesota

APPENDIX A

Order Denying Motions To Dismiss Counts I and III Of Indictment

This matter comes before the Court on defendant's motions to dismiss Counts I and III of the indictment.

Mr. C. Stanley McMahon, of Winona, Minnesota, and Mr. Floyd V. Nichols, of Albert Lea, Minnesota, appeared in behalf of defendant in support of said motions; and

Mr. George E. MacKinnon, United States Attorney, and Mr. Alex Dim, Assistant United States Attorney, of St. Paul, Minnesota, appeared in behalf of the United States of America, in opposition thereto.

When this case was called for trial, defendant moved to dismiss Counts I and III of the indictment and framed his motions as follows:

> "I would like to move to dismiss Count I on the ground that it is duplicitous and does not state an offense; and I move to dismiss Count III on the ground it does not state that the liquor was purchased in interstate commerce and in absence of that it is my position the Federal Alcohol Administration Act, that part of it that charges an offense, is unconstitutional because it must be limited to interstate commerce and does not so allege.
>
> "My point on the first count—I take it the Court has read the indictment—it charges over the period of October to June 1, 1954, the defendant failed to make entries and wrongfully and unlawfully and intentionally failed to make entries in and properly keep certain forms which are monthly reports. So there are eight reports involved in that indictment apparently from October, 1953, to and including June, 1954. My point is the failure to keep or make entries in any one report is an offense and each is a separate offense and the Government is charging eight offenses in one indictment."

At the close of the trial, the defendant made his motion to dismiss as follows:

> "May it please the Court, at this time the defendant moves the Court to dismiss the indictment as to both counts and for a judgment of acquittal as to both counts on the following grounds:
>
> "That the indictment is duplicitous and does not state an offense against the United States.
>
> "I would like to confine my argument particularly to the first count if I might.
>
> "I might say as to the second count [Count III] I renew the motion made before the trial commenced and as to that count I have not objected to the form of that count. It is in the language of the statute. But my objection to that count is that there is no proof in this case that any of the purchases, and it is the purchases that is the essence of that count, were made in interstate commerce. In fact, there is a failure of proof, as I see it, on that count that any of the liquor sold for resale at wholesale was purchased within the time of this indictment; and I take it that is a matter of proof that the government has failed to make. In addition to that there is no proof—in fact the proof is to the contrary—that all the purchases he ever made for retail or wholesale were made in intrastate commerce. In the absence of an interstate sale it is my point that the Federal Alcohol Administration Act is without any jurisdiction."

The Court denied the motions, but indicated that he would give counsel an opportunity to be heard later on more fully than the exigencies of the trial permitted. Consequently, this matter comes before the Court for further consideration of the motions that were made. However, in briefing the matter, counsel for the defendant also alleges that Count I is fatal because it fails to allege in what particulars the alleged statement or entries were false, or that the alleged false statement and false entries, or the failure to keep records are material. And, in addition, defendant urges in his

brief that Count I does not state an offense against the United States because that count fails to allege that Hanf was a person required by law to keep such records and make such reports as are described in Count I.

At the outset, it should be noted that none of these objections to Count I of the indictment are timely. They should be denied for that reason. The indictment was returned on September 9, 1954. A plea of not guilty was entered by defendant when he was represented by counsel on September 27, 1954. The first notice the Government had as to any motion with respect to the indictment was just before the jury was drawn on May 23, 1955. A period of over nine months elapsed between the entry of the plea and the making of the motion. If the motion had been made timely, the Government would have been in a position to reindict, if that were deemed necessary, and the matter could have proceeded to trial at the May term at Winona. However, notwithstanding the fact that the motions as to Count I were not made timely, the Court will discuss briefly his views thereon.

The purpose of an indictment is to acquaint a defendant with the offense with which he is charged so that he can prepare his defense and protect himself against double jeopardy. As defendant points out, Count I does not allege that Hanf is a person who is required by law to keep such records and make such reports as are set forth in this count. However, that this indictment acquaints the defendant with the charge is evident, and in view of the charge that he unlawfully failed to comply with the statute, to all intent and purposes he is informed that he is one of the persons who is required under the law to keep such records and file such reports. A reading of the indictment would permit no other interpretation, and defendant was fully acquainted with the Government's contention that he was required under the law to make such records and to file such reports as fully as if a formal statement in the indictment was made to that effect. In any event, if there is merit to defendant's contention in this regard, the objection was not urged until after the verdict has been returned, and hence the objection now is wholly untenable.

Likewise, the belated attack directed to the first count in that the count fails to allege in what particulars the alleged statement or entries were false, or to allege that the alleged false statement and false entries or the failure to keep records was material, cannot now be urged by defendant. Objection was not made until after the verdict, and the evidence fully established the materiality of the records which the defendant failed to keep and the materiality of the false entries which he made.

In considering the motion to dismiss for duplicity, it will be noted that it was defendant's position that the regulations require the report on Form 338 to be made monthly, and in that from October, 1953, to June, 1954, eight months are included, therefore eight separate offenses were charged with reference to his failure to make entries in Form 338. However, a reading of the statute demonstrates that the objection of duplicity as urged by defendant at the opening of the trial is without any substantial merit. The pertinent portions of the statute read:

> "Every rectifier and wholesaler who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary. * * *"

shall be subject to the penalty prescribed. The indictment charges that between October 16, 1953, and July 1, 1954, defendant failed to make entries in, and properly keep, record 52B and Form 338. 52B is the daily record and Form 338 is the monthly summary. In that the statute speaks of a wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, it seems apparent that such refusal would constitute a continuing offense, and proof which would indicate that such refusal and neglect continued between October, 1953, and July, 1954, would be sufficient to sustain the charge and cannot be subject to the objection of duplicity.

The gravamen of the offense is the failure to keep the records required under the law. In that the statute uses the term "records", the mere fact that the failure to keep rec-

ords involved more than one record required by law would not prevent the Government from proving that the neglect and refusal took place over a period of time. No objection was made to Count I as being vague or indefinite. Defendant made no motion for a bill of particulars, nor did he assume to require the Government to make any election. If there is any duplicity in Count I, it might arise from the fact that the count includes not only the failure to keep records, but also the filing of false records. However, defendant made no such objection as to duplicity. But if a reading of Count I of the indictment would indicate that it is duplicitous, it is quite apparent that the charge of duplicity was one which could not be satisfactorily determined until all of the evidence had been heard. The undisputed facts in this action disclosed that defendant during this period referred to in the indictment entered upon a course of conduct which had for its ultimate purpose the concealment of all sales of five gallon lots or more of liquor which he made at one time to one person in order to cover up such sales to the Veterans of Foreign Wars Club and to the Elks Club at Albert Lea, Minnesota. Defendant's purpose in this regard was obviously to protect his customers, who were selling liquor over the bar in dry territory. During this period, he did not report a single sale of five gallon lots or more to one person at one time, although the evidence indicated that there was a large number of such sales. He made no reports whatsoever on Form 52B, that is, of his daily sales, and the few reports that he made on Form 338 and which were filed with the Treasury Department were manifestly false. Here, therefore, we do not have a situation where some sales were reported and others were not, so as to require the Government to determine which sales were not correctly reported on Form 52 and summarized on Form 338. In reality, therefore, we have a single course of conduct with a singleness of purpose, and the Government has treated, therefore, the failure to keep records and the filing of false records as one offense. The singleness of purpose is further evidenced by the fact that the defendant filed Exhibits 1 to 1-D, inclusive (Form 338) during this period and on which he falsely noted "No transactions."

Defendant, therefore, is in no position to complain if the Government has determined that during this period his violations consisted of a course of conduct and not a multiplicity of separate offenses which under the evidence could have mounted up in penalties to an unconscionable amount, and in addition long jail penalties. No evidence whatsoever was offered by defendant to contradict the Government's proof. The defendant himself did not take the stand. Therefore, the Government's position that the violations established were motivated by a singleness of purpose to flout the law so as to protect the defendant's customers remains uncontradicted. A presentation of the defendant's violations to the Court on the Government's theory was far more favorable to him than the institution of a large number of counts by way of charging a multiplicity of offenses. The uncontradicted evidence offered by the Government would seem to justify the view that this matter fairly comes within the teachings of United States v. Universal C. I. T. Credit Corporation, 344 U. S. 218. Moreover, because of the Government's election to construe his offenses as a single offense, the defendant is fully protected by a plea of former jeopardy by way of res judicata or collateral estoppel.

Defendant's motion to dismiss Count III of the indictment, which was made at the opening of the trial and renewed at the close of all the testimony, is directed to the fact that the indictment did not state that the liquor was purchased in interstate commerce, which he contends is essential to the jurisdiction of this Court, and it is defendant's position that the Federal Alcohol Administration Act is unconstitutional if it assumes to require wholesalers who sell for resale only in intrastate commerce to have a basic permit. The defendant was a customer of Griggs Cooper in St. Paul and Ed Phillips and Son of Minneapolis, wholesale liquor dealers who were handling liquor in interstate commerce and who sold whisky in wholesale lots to this defendant in 1953 and the first six months of 1954. To the extent that the defendant during the period from October, 1953, and the first six months of 1954 purchased liquor from these concerns in wholesale quantities for resale was a jury question. The Court submitted that question to the jury and

no objection was made to the instructions. In view of the broad powers of the Government with respect to the enforcement of its revenue laws, the Act irrespective of interstate commerce is reasonably related to the protection of government revenue. Consequently, defendant's motion to dismiss Count III of the indictment must be denied.

It follows from the foregoing that defendant's motions must be, and the same hereby are, in all things denied. It is so ordered. An exception is allowed.

Defendant will appear before this Court for sentence at the United States Court House in Minneapolis on Monday, September 12, 1955, at ten o'clock a.m.

Dated this 16th day of August, 1955.

By the Court:

GUNNAR H. NORDBYE,
Chief Judge.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit.

No. 15,428.

Eugene E. Hanf, Appellant,

vs.

United States of America, Appellee.

Appeal from United States District Court for the District of Minnesota.

[July 25, 1956]

C. Stanley McMahon, for Appellant.

Alex Dim, Assistant United States Attorney (George E. MacKinnon, United States Attorney, was with him on the brief), for Appellee.

Before Gardner, Chief Judge, and Vogel and Van Oosterhout, Circuit Judges.

Vogel, Circuit Judge.

Eugene E. Hanf was tried before and convicted by a jury on Counts 1 and 3 of an indictment charging a violation of 26 U.S.C.A. §2857, 26 C.F.R. §194.75 and 27 U.S.C.A. §203(c)(1). Prior to trial, the court, on motion of the government, dismissed Count No. 2. The indictment, insofar as it may be pertinent herein, is as follows:

"United States of America,
Plaintiff,

vs.

Eugene H. Hanf,
Defendant.

Indictment

(26 U.S.C., Sec. 2857, 26 C.F.R., Sec. 194.75)

The Grand Jury charges:

Between October 16, 1953, and July 1, 1954, inclusive, in the City of Austin, County of Mower, State and District of Minnesota, Eugene E. Hanf, did then and there wilfully, wrongfully, unlawfully and intentionally fail to make entries in and properly keep Record 52B, 'Wholesale Liquor Dealer's Monthly Report', and Form 338, 'Wholesale Liquor Dealer's Monthly Report (Summary of Forms 52A and 52B)', and knowingly and intentionally and wilfully submitted and filed said forms and documents, containing false statements and false entries, with the United States Treasury Department, Internal Revenue Service.

Count II

[Dismissed.]

Count III

(27 U.S.C., Sec. 203(c)(1).)

Between October 16, 1953, and July 1, 1954, inclusive, in the City of Austin, County of Mower, State and District of Minnesota, Eugene E. Hanf, did wilfully, wrongfully, unlawfully and intentionally engage in the business of purchasing distilled spirits for resale at wholesale, without first having procured a wholesaler's basic permit."

At all times dealt with herein, the appellant had been an off-sale retail liquor dealer in Austin, Minnesota, doing business under the name of Bell Liquor Store. He was also the holder of a wholesaler's special tax stamp under the provisions of 26 U.S.C.A. §3250(a)(1) (1939 Internal Revenue Code). As the holder of a wholesaler's special tax stamp, the appellant was permitted to sell distilled spirits

in lots of five wine gallons or more to the same person at the same time provided he kept Treasury Department records Forms 52, 52A, 52B and 338 as required by 26 U.S. C.A. §2857(a) (1939 Internal Revenue Code) and the regulations issued by the Commissioner of Internal Revenue to be found in 26 Code of Federal Regulations, §194.75 (a).

Appellant made no reports on the required Forms 52A and 52B. Form 338 was falsified and, as such, submitted. The government further established that beginning in 1952 and including the time covered by the indictment substantial sales were made in excess of five wine gallons at one time to one person but that such sales were not reflected in the forms hereinbefore mentioned.

It was the position of the government that under the Internal Revenue laws the appellant, as the holder of a Federal Retail Liquor Dealer's Stamp, was permitted to sell distilled spirits in quantities of less than five wine gallons to the same person at the same time and, under the Internal Revenue laws, the appellant, as the holder of a Federal Wholesale Liquor Dealer's Stamp, was permitted to sell in quantities of five wine gallons or more to the same person at the same time, but that under the provisions of 27 U.S.C.A. §203(c)(1) the appellant was not permitted to sell to trade buyers for resale unless he was the holder of a basic permit; that appellant had never applied for a basic permit and has never been issued a basic permit at any time, and that accordingly he had no right to *purchase* distilled spirits at wholesale for resale to trade buyers. That he did purchase for resale at wholesale is beyond dispute. Upon conviction, the appellant was sentenced to a period of imprisonment of 3 months and a fine of $1500.00 on Count 1 and to pay a fine of $1,000.00 on Count 3, the appellant to be imprisoned until payment of the fines or until otherwise discharged as provided by law.

Appellant raises five points on appeal to this court. They will be considered in the order in which they appear in appellant's brief.

Appellant's first point goes to Count 1. Appellant claims that "Count 1 of the indictment does not charge an offense against the United States in that it does not contain the essential facts of the offense intended to be charged". One of the principal cases relied on is *Harris v. United States,* 8 Cir., 1939, 104 F. 2d 41. In that case the first paragraph of the indictment charged defendant with making "a false Statement of Mailing" and later in the second paragraph referred to the instrument as a "receipt". The court concluded that two different instruments were contemplated; therefore the charge against defendant was ambiguous or at least not clear. To establish a crime, it was necessary that the paper be properly identified and this was not done. In the instant case, there was no question of proper identification. The statute violated was clearly set forth. Appellant was aware, or could have been made aware, of the offense being charged. The material facts constituting the offense were alleged. Failure to state *every* fact concerning the offense does not destroy the entire pleading. In short, in the *Harris* case the indictment was flagrantly deficient. It and the other cases cited by appellant are not authority for appellant's contention.

With reference to the question of sufficiency of the indictment, the trial court, in denying appellant's motion to dismiss Count 1, stated:

"The purpose of an indictment is to acquaint a defendant with the offense with which he is charged so that he can prepare his defense and protect himself against double jeopardy. As defendant points out, Count 1 does not allege that Hanf is a person who is required by law to keep such records and make such reports as are set forth in this count. However, that this indictment acquaints the defendant with the charge is evident, and in view of the charge that he unlawfully failed to comply with the statute, to all intent and purposes he is informed that he is one of the persons who is required under the law to keep such records and file such reports. A reading of the indictment would permit no other interpretation, and defendant was fully acquainted with the Government's contention that he was required under the law to make such records and to file such reports

as fully as if a formal statement in the indictment was made to that effect."

In a similar attack on an indictment, this court said, in *Hewitt v. United States*, 8 Cir., 1940, 110 F. 2d 1, 6, cert. den. 310 U. S. 641:

"The sufficiency of an indictment should be judged by practical, and not by technical, considerations. It is nothing but the formal charge upon which an accused is brought to trial. An indictment which fairly informs the accused of the charge which he is required to meet and which is sufficiently specific to avoid the danger of his again being prosecuted for the same offense should be held good." See also *United States v. Goldberg*, 8 Cir., 1955, 225 F. 2d 180; *Wolpa v. United States*, 8 Cir., 1936, 86 F. 2d 35, cert. den. 299 U. S. 611; *Cowl v. United States*, 8 Cir., 1929, 35 F. 2d 794, 797, and cases therein cited.

We are of the opinion that here the indictment sufficiently apprised the appellant of the formal charge which he had to meet. If he desired further information, a demand for a bill of particulars was open to him under Rule 7(f), Federal Rules of Criminal Procedure.

Appellant's second point is also against Count 1 of the indictment. It is that "Count 1 of the indictment is duplicitous in that it charges more than one offense in one count". The government's first reply to the charge that Count 1 of the indictment was duplicitous is that the attack thereon for duplicity was not timely and was properly denied for that reason. The government points to Rule 12(b) of the Federal Rules of Criminal Procedure which provides in part as follows:

"(1) Defenses and Objections Which May Be Raised.

Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) Defenses and Objections Which Must Be Raised.

Defenses and objections based on defects in the institution of the prosecution or in the indictment or information

other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) Time of Making Motion. The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter."

The indictment against the appellant was returned on September 9, 1954. On September 27, 1954, the appellant appeared with his counsel at St. Paul, Minnesota, and entered a plea of not guilty to all counts in the indictment. No attack on the indictment was made then or at any time until the case was called for trial at Winona, Minnesota, on May 23, 1955, at which time the appellant moved to dismiss Count 1 on the ground that it was duplicitous. The trial court stated that the objections to Count 1 of the indictment were not timely and that "they should be denied for that reason", but nevertheless proceeded to give consideration to the attack on its merits. The trial court stated:

"In considering the motion to dismiss for duplicity, it will be noted that it was defendant's position that the regulations require the report on Form 338 to be made monthly, and in that from October, 1953, to June, 1954, eight months are included, therefore, eight separate offenses were charged with reference to his failure to make entries in Form 338. However, a reading of the statute demonstrates that the objection of duplicity as urged by defendant at the opening of the trial is without any substantial merit. The pertinent portions of the statute read:

'Every rectifier and wholesaler who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary. * * *'

shall be subject to the penalty prescribed. The indictment charges that between October 16, 1953, and July 1, 1954, defendant failed to make entries in, and properly keep, record 52B and Form 338. 52B is the daily record and Form 338 is the monthly summary. In that the statute speaks of a wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, it seems apparent that such refusal would constitute a continuing offense, and proof which would indicate that such refusal and neglect continued between October, 1953, and July, 1954, would be sufficient to sustain the charge and cannot be subject to the objection of duplicity.

The gravamen of the offense is the failure to keep the records required under the law. In that the statute uses the term 'records', the mere fact that the failure to keep records involved more than one record required by law would not prevent the Government from proving that the neglect and refusal took place over a period of time. No objection was made to Count I as being vague or indefinite. Defendant made no motion for a bill of particulars, nor did he assume to require the Government to make any election. If there is any duplicity in Count I, it might arise from the fact that the count includes not only the failure to keep records, but also the filing of false records. However, defendant made no such objection as to duplicity."

We agree that the trial court would have been thoroughly justified in denying the motions on the grounds that they were not timely made. We also concur with the trial court that even if the motions had been made timely they nevertheless should have been overruled. The indictment charged that between October 16, 1953, and July 1, 1954, the appellant did wilfully and wrongfully fail to make entries in and properly keep record 52B, "Wholesale Liquor Dealer's Monthly Report", and Form 338, "Wholesale Liquor Dealer's Monthly Report (summary of Forms 52A and Monthly Report", and Form 338, "Wholesale Liquor 52B)", and charged that he knowingly and intentionally submitted said forms containing false statements and false entries. This, in effect, was charging a course of conduct engaged in by the appellant between October 16, 1953, and

July 1, 1954. Granting that the government might technically have broken this down into many separate, individual offenses, we do not see the necessity for doing so. The rule against duplicitous pleading is not offended by a count charging more than one act if the acts were part of a transaction constituting a single offense. Certainly, any similar prosecution by the government against this appellant for a violation committed at any time between the dates indicated in Count 1 of the indictment would be a prosecution for the same offense, and would be promptly dismissed.

As we said in *Mellor v. United States*, 8 Cir., 1947, 160 F. 2d 757, 762, cert. den. 331 U. S. 848:

"We know of no rule that renders an indictment duplicitous because it charges as one joint offense a single completed transaction instead of charging in separate counts as many offenses as the evidence at the trial might conceivably sustain."

We find no merit in appellant's second position.

Appellant's third point is that his "motions to dismiss were timely". As already indicated supra, we are of a contrary opinion, but even if timely, the indictment was sufficient and for that reason this point needs no further comment.

Appellant's fourth point is that "Count 1 of the indictment does not charge an offense against the United States in that it fails to allege in what particulars the statements or entries were false or that their falsity was material to the government and the evidence fails to show materiality". Appellant urged this for the first time after trial and receipt of the jury's verdict. In dealing with this question, the trial court said:

"Likewise, the belated attack directed to the first count in that the count fails to allege in what particulars the alleged statement or entries were false, or to allege that the alleged false statement and false entries or the failure to keep records was material, cannot now be urged by defendant. Objection was not made until after the verdict, and

the evidence fully established the materiality of the records which the defendant failed to keep and the materiality of the false entries which he made."

We think that the objection made was not timely and should promptly have been denied. We further believe that the trial court's finding that "the evidence fully established the materiality of the records * * *" may not now be challenged in this court. That the false entries made by the appellant were material to the government seems too plain for argument. Also, the particulars as to falsity need not be alleged in the indictment since they are a matter of proof at the trial.

Appellant's fifth and last point is that "Count 3 of the indictment does not charge an offense because it fails to allege that appellant was engaged in the business of purchasing distilled spirits in interstate commerce and to sustain its validity 27 U.S.C.A. 203(c)(1) must be interpreted as affecting only interstate or foreign commerce." There appears to be no question from the record but what the appellant was engaged in purely an intrastate business. While the persons and firms from whom he purchased distilled spirits were engaged in interstate commerce, his purchases from them were made entirely within the State of Minnesota and his sales were only to buyers within the State of Minnesota. The statute with which we are concerned and insofar as it may be applicable herein reads as follows:

"Title 27, United States Code—Intoxicating Liquors. (Chapter 8, Federal Alcohol Administration Act.)

§203. Unlawful businesses without permit; application to state agency.

In order effectively to regulate interstate and foreign commerce in distilled spirits, wine, and malt beverages, to enforce the twenty-first amendment, and to protect the revenue and enforce the postal laws with respect to distilled spirits, wine, and malt beverages:

* * * * *

(c) It shall be unlawful, except pursuant to a basic permit issued under this chapter by the Secretary of the Treasury—

(1) to engage in the business of purchasing for resale at wholesale distilled spirits, wine, or malt beverages; * * *".

Appellant's position is that the Act is unconstitutional if it assumes to control the resale of liquor by wholesalers in intrastate commerce. A bare reading of that part of the Act from which Count 3 was formulated indicates no mention of an attempt to control intrastate commerce; indeed, it expressly states in the preamble that the purpose of the entire Act is "to regulate interstate and foreign commerce." Continuing to read on into 203(c)(1), however, the words "interstate and foreign commerce" are omitted. The main question, then, becomes whether or not the statute as read literally is intended to cover appellant's business and, if it is so intended, is the statute constitutional?

While the express purpose or objective is to "regulate interstate and foreign commerce", the statute, if read literally, does affect intrastate business in that a basic permit from the Secretary of the Treasury of the United States is necessary in order, among other things, to "engage in the business of purchasing for resale at wholesale * * *", regardless of whether the one purchasing is doing an intrastate or interstate business. Appellant suggests that inasmuch as, according to his view, the statute, if read literally, is unconstitutional, we so interpret it as to give it a constitutional meaning by reading into it the words "in interstate or foreign commerce" after the word "purchasing".

First, we think the statute was worded as Congress intended and that a literal construction must prevail. A reading of the House of Representatives Report No. 1542, 74th Congress, First Session (1935), indicates that the Congress was vitally concerned with the peculiar, difficult and involved problems of the liquor traffic itself and as enhanced by the preceding prohibition era, and that these problems made necessary the "relatively drastic enforcement methods, such as the permit system * * *." The 21st Amend-

ment, in addition to repealing the 18th, had made it the business of the federal government to prohibit the transportation of intoxicating liquor into any state in violation of the laws thereof. This was not a limitation of the constitutional power to regulate interstate and foreign commerce but an additional burden of enforcement on the federal government. It enhanced the difficulties with which Congress had to deal.

The House of Representatives Report, supra, leaves no room for doubt that Congress felt it necessary, in order to properly regulate interstate and foreign commerce and carry out its duties under the 21st Amendment, to provide for some control over those engaged in the purchase of liquor for resale at wholesale.

"The permit provisions apply to all members of the specified industries irrespective of whether the permittee's operations are intrastate or interstate in character. Apart from the more effective enforcement of revenue and postal laws which apply as well to intrastate as to interstate operations, laws relating to the enforcement of the 21st Amendment and to interstate commerce require that the permit system extend to all intrastate operations in order that the permit system may be an effective means of preventing evasion of these laws. The intricacies of corporation setups, the establishment of branch houses and sales corporations, the use of rectifiers, blenders and wholesalers as interstate distribution conduits and the disposal of stocks through sale of warehouse receipts make it necessary that all industry members of the specified industries operate under permits irrespective of the character of their operations at any time if the permit system is to prove adequate in more effectively enforcing the revenue and postal laws and laws relating to interstate commerce and the 21st Amendment."

We must conclude from the foregoing and from a reading of the Act itself that the Congress intended to cover intrastate activities because of the effect of such activities on interstate control.

The next question is whether the Act as so interpreted is constitutional. It is conceded that the 21st Amendment did not deprive the federal government of control over the liquor traffic in interstate commerce. *Arrow Distilleries v. Alexander,* 7 Cir., 1940, 109 F. 2d 397, 400, cert. den. 310 U. S. 646; *Washington Breweries Institute v. United States,* 9 Cir., 1943, 137 F. 2d 964, cert. den. 320 U. S. 776; *Duckworth v. Arkansas,* 1940, 314 U. S. 390. The 21st Amendment by its terms prohibits transportation of liquors into a state in violation of the laws of such state. The ability on the part of the states to restrict liquor traffic in no way deprives the federal government of concurrent jurisdiction. Beyond a doubt the states have been given broad surveillance over liquor business within their boundaries, but it is equally certain that their jurisdiction is not plenary and exclusive. *United States v. Frankfort Distilleries,* 1944, 324 U. S. 293, 299.

Granting, then, that Congress has the power to regulate interstate commerce in intoxicating liquor and to prohibit transportation or importation thereof into any state in violation of the laws of such state, and that in so implementing that power it attempted by the Federal Alcohol Administration Act to create regulations for intrastate commerce in intoxicating liquor, we must examine the question of whether such attempt was proper.

Where activities in intrastate commerce substantially affect interstate commerce so as to make its control difficult, Congress then has the power to regulate such intrastate activities.

"The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCulloch v. Maryland,* 4 Wheat. 316, 421. Cf. *United States v. Ferger,* 250 U. S. 199." *United States v. Darby,* 1940, 312 U. S. 110, 118.

See also *Wickard v. Filburn*, 1942, 317 U. S. 111. This does not advance the proposition that Congress, entirely apart from delegated powers, may enact measures governing local business. It may do so only when the local activity to be regulated substantially affects interstate commerce. See *Mandeville Island Farms v. American Crystal Sugar Co.*, 1948, 334 U. S. 219.

It is true that distinctions have been made as to "direct" and "indirect" effects on interstate commerce, "indirect" effects being outside the scope of federal regulation. *Schechter Poultry Corp. v. United States*, 1934, 295 U. S. 495. A single transaction involving the sale of liquor or even, as we have in this case, a series of sales by one individual entirely consummated within one state may be of little moment to the course of interstate traffic, yet when combined with many similar sales the cumulative effect on interstate commerce becomes at once apparent. This court holds that even though the activities of appellant were begun and finished within Minnesota, such activity is subject to federal regulation because of its effect upon interstate commerce. Moreover, the wholesalers from whom the liquor was purchased were interstate operators. There was a practical continuity of movement from the distillery to appellant's place of business.

The control of intrastate liquor business by the federal government is not unique. There are many familiar examples of incidental control of certain activities normally beyond Congressional reach. E.G. *Minnesota Rate Cases*, 1913, 230 U. S. 352 (regulation of intrastate rail rates); *United States v. Wrightwood Dairy Co.*, 1942, 315 U. S. 110 (regulation of intrastate milk prices); *Mulford v. Smith*, 1938, 307 U. S. 38 (regulation of intrastate tobacco market).

The power to regulate interstate commerce is not the only ground for sustaining the constitutionality of the Federal Alcohol Administration Act. In dealing with the appellant's contention that the Act was unconstitutional if it assumes to require wholesalers who sell for resale in intrastate commerce to have a basic permit, the trial court stated:

"In view of the broad powers of the Government with respect to the enforcement of its revenue laws, the Act irrespective of interstate commerce is reasonably related to the protection of government revenue."

We think the trial court was entirely sound in its statement and that the appellant's contention that the Act has nothing to do with revenue and serves no purpose for protecting revenue cannot be upheld. On two prior occasions this court has dealt with that precise argument. It has held that a statute regulating the refill of liquor bottles was reasonably related to the protection of the revenue and also that a statute with the primary purpose of suppressing the drug habit bore a substantial relation to revenue. *United States v. Goldberg*, 8 Cir., 1955, 225 F. 2d 180, 186, 188; *Hughes v. United States*, 8 Cir., 1918, 253 F. 543, cert. den. 249 U. S. 610.

Affirmed.

A true copy.

Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

(Judgment)

United States Court of Appeals
For the Eighth Circuit

No. 15428—September Term, 1955.
Wednesday, July 25, 1956.

Eugene E. Hanf, Appellant,

vs.

United States of America.

Appeal from the United States District Court
for the District of Minnesota.

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further ordered by this Court that the defendant in the said District Court, Eugene E. Hanf, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

July 25, 1956.

APPENDIX D

§2857. Books of rectifiers and wholesale dealers.

(a) Requirements. Every rectifier and every wholesale liquor dealer who sells, or offers for sale, distilled spirits in quantities of five wine-gallons or more to the same person at the same time shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records; Provided, That the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe.

The records required to be kept under the provisions of this section and regulations issued pursuant thereto, shall be preserved for a period of four years, and during such period shall be available during business hours for inspection and the taking of abstracts therefrom by the Commissioner or any internal revenue officer.

Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, or to make entries therein, or cancels, alters, or obliterates any entry therein (except for the purpose of correcting errors) or destroys any part of such records, or any entry therein, or makes any false entry therein, or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years.

Every rectifier and wholesale liquor dealer who refuses or neglects to render transcripts or summaries in the form required by the Commissioner, with the approval of the Secretary, shall, upon conviction, be fined not more than $100 for each such neglect or refusal. (1939 Internal Revenue Code, Sec. 2857.)